

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

¹ See **Commissioner's Review**, dated May 6, 2004.

Easter Seals Children's Services (hereinafter referred to as "the facility") where the petitioner was employed as director. The Department's decision is based primarily on the allegations of a residential instructor at that facility. A hearing in the matter was held on January 20, 2005.

2. The following is a summary of the testimony of the residential instructor at the hearing.

a. On November 9, 2003 the witness and her unit supervisor were in the process of getting the residents ready for bed. The child in question, who was about 5 feet tall and weighed between 130 and 140 pounds, refused to take her evening medication and crawled underneath her bed.

b. After the child resisted their attempts to have her come out the supervisor reported the problem to the petitioner, who instructed them to let her sleep there.²

c. The supervisor then gave the child a ten-minute warning to come out or "lose her privileges". The instructor remained in the room to monitor the child's behavior.

² The witness testified that she heard the petitioner tell the supervisor, "Let her sleep on the cold floor". The supervisor testified that she had no recollection of this statement, and she told the Department's investigator that she didn't believe the petitioner spoke or acted

d. The supervisor returned to give another warning.

This time the child got onto her bed but verbally threatened the supervisor. When the supervisor attempted to convince the child to take her medication the girl "attacked" the supervisor by leaping onto her from her bed.

e. The instructor went to the supervisor's assistance and attempted to restrain the child on the floor. The child was hitting and kicking them and was attempting to bite the instructor.

f. Another instructor entered the room and joined in trying to restrain the child, with limited success.

g. Hearing the commotion the petitioner came into the room and instructed the three staff members to release the child. When they did so the child kicked the other instructor hard enough to knock her over.

h. After helping the other instructor to her feet the petitioner directed that instructor and the supervisor to attend to the other children. The witness remained in the room with the petitioner.

inappropriately that evening (see *infra*). At any rate, there is no evidence that the child heard the petitioner say this.

i. When the petitioner attempted to talk to the child the child threw a table lamp at her, which missed and crashed against the wall. When the petitioner moved toward the child, the child started throwing books and papers at her.

j. The child then placed herself behind her dresser against the wall and tried to use the dresser to fend off the petitioner. The child swung her arm at the petitioner and the instructor stated she saw the petitioner grab the girl by the hair and forcibly push her head into the wall.

k. Sometime during this time the supervisor returned to the room. The girl suddenly turned around and violently kicked out the window casement in the room (which was on the first floor) and jumped out the window and fled the facility.

l. The instructor described the petitioner's demeanor as "angry".

m. The petitioner later told the staff that she didn't feel the staff had "backed her up" during the incident. The petitioner later told the instructor, "I really blew that one".

n. The witness admitted to being very distraught during and after the incident.

o. In the hours and days following the incident the instructor felt "intimidated" by the petitioner in reporting her version of the incident.

3. The other instructor who was present in the room also testified for the Department. Her testimony included the following:

a. The child was a "self-harmer", with a history of cutting herself, running in front of cars, and banging her head. She was on anti-psychotic medication and her self abuse and "hallucinations" were worse when she didn't take her medication.

b. She attempted to help the other two staff members restrain the child after the child attacked the supervisor, and was on the floor with them when the petitioner entered the room.

c. When they had released the child and the child had started throwing things, this witness started removing the debris from the room. She returned to the room just as the child was exiting through the window. Before she returned she heard the petitioner say, "There, how do you like that".

d. She testified that the child was "in a rage" and that the petitioner "seemed angry".

e. She did not see the petitioner strike the child or grab her hair.

4. The testimony of the Department's investigator included the following:

a. The child was picked up by the police later that night, but because she assaulted the police she was housed overnight at the state juvenile detention facility (Woodside).

b. The next day the Family Court placed her at the Brattleboro Retreat based on her doctor's opinion that she was "suicidal".

c. When the investigator interviewed the petitioner, the petitioner did not mention any physical contact with the child until the investigator confronted her with the instructor's allegations. The petitioner then told her that she had used her hand to restrain the child's head to prevent the child from banging her head forward onto the dresser in an attempt at self-abuse.

d. The investigator interviewed the child while she was at the Brattleboro Retreat. The child never alleged

that the petitioner hit her or grabbed her hair. She did allege that the police had assaulted her.³

e. The child told the investigator that "it was possible" that she had tried to hit her own head that night.

f. The other instructor told the investigator that she didn't see the petitioner hit the child (see paragraph 3, *supra*).

g. The unit supervisor told the investigator that she never saw the petitioner "lay an hand on" the child, and that she did not observe the petitioner "do anything inappropriate" that night (see paragraph 5, *infra*).

h. There is no evidence or indication that the child suffered any physical injury.

i. The above notwithstanding, the investigator, in effect, fully credited the instructor's version of the events that night (see paragraph 2, *supra*) and determined that the petitioner should be placed in the Department's registry as having abused the child.

5. The unit supervisor testified on behalf of the petitioner, including the following:

³ There is no indication that the Department followed up on this allegation in its investigation.

a. The only thing she remembers the petitioner saying to the child was, "Don't hit me".

b. The only physical contact she observed was the petitioner pushing the dresser back toward the child.

c. She heard "one noise" while she was out of the room, which she admitted under cross examination "may have been" the sound of the child hitting her head against the wall. Based on all the other evidence in this regard, however, it is found that the noise this witness heard was the sound of the child kicking out the window casement.

d. The child was "out of control" during this incident.

6. The Vice President of Easter Seals Children's Services, who was the petitioner's immediate supervisor, but who does not work at the facility and was not present on the night in question, was also called as a witness by the petitioner. She stated that during the facility's internal investigation of the incident the instructor (see paragraph 2, *supra*) did not allege that the petitioner had hit the child's head against the wall, only that she had grabbed the child's hair. This witness stated, however, that any physical or verbal confrontation between staff and children at the facility is "inappropriate", and that she feels the

petitioner should have left the room rather than confront the child. She also confirmed that the instructor had told her she felt intimidated by the petitioner in reporting the incident.

7. Based on the weight and relative credibility of the evidence presented it cannot be found that the petitioner ever pushed the child's head into the wall or window frame. Although the petitioner may have grabbed the child's hair, and even if this is considered professionally "inappropriate"⁴, the weight of the evidence is that this was an instantaneous reaction in a crisis situation involving an out-of-control child who had assaulted four staff persons and who may have been attempting to seriously harm herself. There is no credible evidence that this act, in and of itself, posed any significant risk of "physical injury" to the child.

8. There is also no evidence that a single incident of grabbing an out-of-control child's hair, especially if it was to prevent her from engaging in self abuse, constitutes "a pattern of malicious maltreatment" resulting in, or likely to

⁴ It should be noted that it was the petitioner's witness who offered this opinion. The Department presented no evidence in this regard.

result in, a detriment to the child's emotional or psychological growth and well being (see *infra*).

ORDER

The Department's decision to substantiate the report of child abuse is reversed, and the petitioners' request to expunge the report from the Department's registry is granted.

REASONS

The Department of Social and Rehabilitation Services is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are "unsubstantiated". 33 V.S.A. §§ 4914, 4915 and 4916.

The statute further provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

33 V.S.A. § 4916(h)

The statute at 33 V.S.A. § 4912 defines abuse and neglect, in pertinent part, as follows:

- (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare . . .
- (3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:
 - (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury . . .
 - . . .
- (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.
 - . . .
- (7) "Emotional maltreatment" means a pattern of malicious behavior which results in impaired psychological growth and development.

In this case, the evidence presented by the Department at the hearing regarding the petitioner's actions prior to the time the child fled through the window (the only time frame noticed by the Department in its decision) does not support a finding that the petitioner abused the child within the meaning of the above provisions. At worst, the petitioner may have violated professional protocols in her handling of the incident. However, the undisputed fact that she was in the throes of a crisis in which staff had been

assaulted and the child was in a position to inflict serious harm to herself clearly distinguishes this case from those in which the Board has held employees of residential facilities to a heightened standard of culpability. See e.g., Fair Hearing No. 15,190. For these reasons the petitioner's request to expunge this report of child abuse from the Department's registry is granted.

#